It has been urged that the foregoing reasoning is applicable "where the drawer of a bill parts with it for less than the legal rate of discount." [44] It is argued that the drawer "simply sells a debt due him from another, engaging that, if the other does not pay it, and peculiar acts of diligence are observed by the purchaser, he will make the debt good," [45] and that the transaction is not a loan and, therefore, not affected by the usury laws.[46] By this transaction the payee merely acquires a liability to have his legal relations altered by the drawee and a power to subject the drawer to a duty and a liability. To say that the drawer "sells a debt due him from another" implies the transfer of the claim or right that the drawer has against the drawee. But this is inaccurate as applied to the payee of a bill, for he acquires no right against nor power over the drawee by virtue of the bill. So this might be regarded as a sale to the payee of a liability to acquire a right against the drawee by acceptance and a guaranty that if the bill is not accepted and paid the drawer will pay. It seems doubtful whether one will pay a large sum for a mere "liability" to acquire a right against another, who has no present duty toward him and who may refuse to give him such right, even though breaching thereby an obligation toward the drawer; in reality, the payee is depending on the promise of the drawer when he takes the bill. Besides the whole transaction has the effect of depriving the drawer of definite monetary assets which are greater than the money consideration; and in this sense there is an inadequacy of consideration for the drawer's promise.[47] The result contended for is another protest against the influence of the doctrine of inquiring into the adequacy of monetary consideration.

To summarize, in simple contracts a nominal sum will not support a promise to repay a larger sum. The generalization therefrom that the equality of the monetary consideration and the promise will be inquired into and that as to any deficiency there is no consideration is inaccurate. In the law of bills and notes, aside from the question of the usury statutes, the adequacy of monetary consideration as between the payee and maker or acceptor will be investigated. But there is authority for the conclusion that where there is a substantial parity, or where the consideration is not obviously intended to be nominal, the consideration, whatever it may be, will be sufficient to support a promise to repay a larger sum. As between the indorsee and the indorser, other than an accommodated indorser known as such to the indorsee, there is a conflict; but it seems that according to the better-reasoned view the sufficiency of the consideration should not be inquired into to limit the indorsee's recovery to the consideration paid and interest, unless the indorsee was a pledgee. And as between the payee and the drawer, both on technical legal grounds and on the ground of fulfilling the expectations of the parties and the desires of the commercial community, the drawer should be held liable for the full face of the bill even though the consideration received therefor was considerably less.

THE EXPENSES OF A RECEIVERSHIP ERRONEOUSLY CREATED.—Although the courts are vested with large discretion in determining which of the parties shall bear

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modated party, and, therefore, the party who is expected to take up the paper upon maturity, the transaction is obviously a loan and not a sale; and an obligation exists between such indorser and indorsee similar to the obligation between a maker and a payee. But when the indorser's accommodated character is unknown to the indorsee, the transaction might be a sale, or the indorsee might have proceeded upon the *bona fide* supposition that a sale was being consummated. In the latter case, full recovery might properly be allowed.

[44] 1 Daniel, *op cit.*, 884; but see *Whitworth & Yancey* v. *Adams* (Va. 1827) 5 Rand. 333, 341.

[45] *Ibid.*

[46] 1 Daniel, *op. cit.*, 886, n. 19 and 18.

[47] This is especially clear in the case of the drawing of a check for an amount greater than the consideration.

the costs of a receivership,[1] the repeated exercise of that discretion has resulted in many instances in the establishment, if not of inflexible rules, certainly of various definite tendencies. Thus, it is quite universally settled that the expenses[2] of a receivership properly created are a charge on the property administered;[3] and it is equally well settled that where the appointment of the receiver is absolutely void for want of jurisdiction, the receiver is not entitled to reimburse himself from the fund or property in his possession.[4] Where the appointment of the receiver is not void but merely improper or irregular, is resisted by the respondent,[5] and is subsequently set aside or reversed, there exists nothing like the unanimity of these last mentioned rules. Yet it is perhaps the weight of authority that the petitioner,—the party at whose instance the respondent was erroneously deprived of his property,—should pay the expenses.[6]

But granted that it is the petitioner who is to bear such expense; granted, that is, that as between the petitioner and the respondent, it is the former who is to be *finally* liable; what is the procedure by which the receiver is to collect his expenses? Is the respondent entitled to the return of his property undiminished by the expenses of the receivership, thereby compelling the receiver to proceed directly against the petitioner[7] and to assume the risks of loss

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[1] See *Brock* v. *Rudig* (Ind. App. 1918) 119 N. E. 491; *Northrup Nat'l Bk.* v. *Varner* (1910) 82 Kan. 691, 109 Pac. 394.

[2] The expenses include the receiver's compensation, and disbursements made and debts and liabilities incurred on behalf of the receivership or business administered.

[3] 2 Tardy's Smith on *Receivers* (2nd ed. 1920) §§ 615-617; 1 Clark, *Receivers* (1918) § 810(b); (1916) 16 COLUMBIA LAW REV. 614.

[4] 2 Tardy's Smith, *op. cit.*, § 627; High, *Receivers* (4th ed. 1910) 934. Similarly, "if the property of which he [the receiver] takes possession is determined to belong to persons not parties to the action." *Ephraim* v. *Pacific Bk.* (1900) 129 Cal. 589, 592, 62 Pac. 177; *Howe & Co.* v. *Jones* (1885) 66 Iowa 156, 23 N. W. 376; High, *loc. cit.*

[5] The importance of this is indicated *infra* in footnotes 6, 17, and 18. Also see *Beach* v. *Macon Grocery Co.* (C. C. A. 1903) 125 Fed. 513, 515.

[6] *In re Lacov* (C. C. A. 1905) 142 Fed. 960; *In re Wentworth Lunch Co.* (C. C. A. 1911) 191 Fed. 821; Tardy's Smith, *op. cit.*, § 627, pp. 1752, 1753. And the petitioner is liable even beyond the amount of his bond. *T. E. Hill Co.* v. *U. S. Fid. & Guar. Co.* (1914) 265 Ill. 534, 107 N. E., 194. The petitioner's liability would undoubtedly be uniformly recognized where he acted fraudulently or in any degree of bad faith in obtaining the receivership. Although the weight of authority is as indicated in the body of the discussion, the petitioner's liability to the receiver in the case of an erroneous receivership has been vehemently denied on the ground that the fact that the petitioner does not finally succeed in the litigation is not the criterion in determining the propriety, necessity or legality of a receiver's appointment. *Ferguson* v. *Dent* (C. C. 1891) 46 Fed. 88; *Middlesborough* v. *Coal & Iron Bk.* (1908) 33 Ky. L. Rep. 469, 110 S. W. 355; *Clark* v. *Brown* (C. C. A. 1902) 119 Fed. 130. It should be noted that the decision in *Clark* v. *Brown, supra,* hinged on the fact that the respondent acquiesced in the erroneous appointment of the receiver and that therefore the expenses might well be borne by the respondent. These cases are not, therefore, contrary to the weight of authority but are distinguishable. *Cf. supra,* footnote 5 and *infra,* footnotes 17 and 18. A third position seems to be that it is entirely in the court's discretion in each case to burden with the expenses that party who should equitably bear them. *Capital City Tob. Co.* v. *Anderson* (1912) 138 Ga. 667, 75 S. E. 1040; *Hembree* v. *Dawson* (1890) 18 Ore. 474, 23 Pac. 264. In one case a rather arbitrary distinction was made, the running expenses during the receiver's administration plus one-third of his compensation being charged to the respondent, or the business, while the petitioner was charged with two-thirds of the receiver's compensation. *French* v. *Gifford* (1871) 31 Iowa 428. It is only with cases and jurisdictions within the majority rule as stated in the body of this note that the remainder of the discussion will deal.

[7] *Beach* v. *Macon Grocery Co.* (C. C. A. 1903) 125 Fed. 513; *McAnrow* v. *Martin* (1899) 183 Ill. 467, 56 N. E. 168; *Weston* v. *Watts* (N. Y. 1887) 45

attendant,—the giving up of his claim against the respondent and his lien on the property administered in exchange for the unsecured personal liability of the petitioner? Or is the receiver to be allowed a lien on the funds and goods in his hands, from which he can retain the amount of his expenses before returning the property to the respondent under the decree terminating the erroneous receivership and thereby force the respondent, already damaged, to seek indemnity of the petitioner[8] and to risk further loss due to the latter's insolvency or other immunity from suit?[8a]

The choice is apparently one based on policy. It has been argued that the respondent has been sufficiently wronged and damaged by depriving him of his property erroneously, and that it would be inequitable to impose upon him the additional burden of paying the receiver and of forcing him then to proceed against the respondent.[9] That the receiver is limited to his right to recover only against the petitioner is said to be entirely just since it is to be assumed that he took his office with full knowledge of its liabilities and risks.[10] On the other hand it has been urged, and it is submitted correctly urged, in favor of allowing the receiver to collect immediately from the respondent and to secure his claim by a lien, that the receiver is an officer of the court and not an agent of the petitioner.[11] His appointment is not "wrongful" as regards the respondent

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Hun 219; *Pittsfield Nat'l Bk.* v. *Bayne* (1893) 140 N. Y. 321, 35 N. E. 630; 2 Tardy's Smith, *op. cit.*, 1753, footnote 3. *People* v. *Jones* (1876) 33 Mich. 303, is frequently cited as authority for this proposition, but that was a case of an utterly void receivership, set aside for want of jurisdiction. Clearly the receiver under such circumstances has no lien on the funds. *Cf. supra,* footnote 4.

[8] *Re T. E. Hill Co.* (C. C. A. 1907) 159 Fed. 73; *Espuella Land & Cattle Co., Ltd.* v. *Bindle* (1895) 11 Tex. Civ. App. 262, 32 S. W. 582; see *Cutter* v. *Pollock* (1898) 7 N. Dak. 631, 633, 76 N. W. 235; *Hopfensack* v. *Hopfensack* (N. Y. 1880) 61 How. Pr. 498, 508. See *Re Chas. W. Aschenbach Co.* (C. C. A. 1910) 183 Fed. 305, interpreting *Re T. E. Hill Co., supra,* as conferring a discretionary power upon the court to charge either the petitioner or the estate immediately, according to the exigencies of each case. See also *Elk Fork Oil & Gas Co.* v. *Foster* (C. C. A. 1900) 99 Fed. 495, where the improper receivership was created on the court's own motion.

[8a] A petitioner is always required to file a bond which theoretically indemnifies the respondent against all loss if it should subsequently appear that the receivership was erroneously created. That possibly is one of the reasons for the rule allowing receivership expenses to be paid out of the property before it is returned to the respondent. But in actual practice little attention is paid to the amount of the bond, and the respondent usually finds it inadequate as security. This situation could be remedied if the court were to require the bond to be increased as soon as it becomes apparent that it is the respondent's intention to contest the validity of the receivership. See *Atlantic Trust Co.* v. *Chapman* (1908) 208 U. S. 360, 28 Sup. Ct. 406. This would adequately protect the respondent; or else the court could direct the payment on the bond directly to the receiver.

[9] *Beach* v. *Macon Grocery Co., supra; Weston* v. *Watts, supra.* In addition, in *Weston* v. *Watts, supra,* at p. 221, it was said that it would be unconstitutional to allow the receiver to collect any part of his compensation out of the property which thus came improperly into his hands, because to do so would amount to a deprivation of property without due process of law.

[10] This argument leads in a perfect circle. The receiver takes office with full knowledge that his sole security is the petitioner—*only if that is the law.* The very question at issue is whether that should be the law.

[11] *Hopfensack* v. *Hopfensack, supra; Re T. E. Hill Co., supra,* at p. 76. This fact that the receiver is an officer of the court has been a persuasive argument in favor of paying and protecting the receiver above all. See (1916) 16 COLUMBIA LAW REV. 614. It was until comparatively recently held on good authority that even in the case of a perfectly regular receivership resulting in a victory for the petitioner, if the fund was insufficient to pay the receiver's expenses, the petitioner despite his victory could be charged. *Chapman* v. *Atl. Trust Co.* (C. C. A. 1902) 119 Fed. 257 and (C. C. A. 1906) 145 Fed. 820. The

though subsequently reversed. Its validity and legality rest entirely and solely upon the jurisdiction of the court to create the receivership and his position in no way depends upon the final determination of the case or the petitioner's success or failure.[12] Nor is a decree reversing or setting aside a former order for a receivership necessarily a declaration of want of jurisdiction *ab initio.* It is, in the cases under discussion, merely a determination of an erroneous exercise of an admitted power because of a mistaken view of the circumstances of the particular case.[13] If the receiver's compensation and right to recover expenses from the property administered were contingent upon the petitioner's success, in only a very few cases could a person be found who would be willing to undertake the responsibility of a receivership.[14]

In the recent case of *In re Hurlburt Motors, Inc.* (D. C., S. D. N. Y., 1920) 64 N. Y. L. J. 1551, the question was squarely before the court. After saying that "the matter is open to doubt in this court", Learned Hand, J., held "that the rule is that the defendant's or respondent's estate is not liable for the receiver's debts or his compensation beyond the amount of the profits realized or improvements arising through profits" during the receivership. "As to anything more the receiver and his creditors have the responsibility only of the plaintiffs or petitioners." This position, it is apparent, is midway between the two views previously announced. It allows the receiver to recover of the respondent and to exert a lien upon the estate administered only to a limited degree. As authority for this conclusion, the court cited four cases,[15] none of which seem binding on the question in issue. They were cases not of wrongful or erroneous but of entirely regular receiverships, and in at least two of the cases,[16] the respondents not only did not resist the petition as in the principal case and in those under consideration, but actually instigated the proceedings himself. Under such circumstances there appears to be no reason for not charging the expenses of the receivership to the business administered.[17] Whatever doubt exists can arise only when it is a question of placing an additional burden upon a respondent erroneously deprived of his property against his will.[18] Otherwise there could be no question of wronging him by making the fund liable for the receivership expenses. Nor does the decision appear sound on principle. The court appointing the receiver should determine the policy it is to pursue; it should either protect the receiver primarily and see him compensated, or take care that the injured respondent, if such it deem him, suffers no further loss, even though the receiver, who may be equally innocent, be damaged. The position of the court in the instant case seems to be a straddle between these two necessarily conflicting policies. If the respondent is deemed to have been

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case was reversed, however, in (1908) 208 U. S. 360, 28 Sup. Ct. 406, and it now seems settled that a petitioner cannot be charged under such circumstances. Tardy's Smith, *op. cit.*, § 616.

[12] *Hopfensack* v. *Hopfensack, supra; Re T. E. Hill Co., supra,* at p. 76; *Ferguson* v. *Dent, supra.*

[13] This distinction is well indicated in Tardy's Smith, *op. cit.*, § 627, pp. 1751, 1752.

[14] *Espuel'a Land & Cattle Co.* v. *Bindle, supra.*

[15] *Tex. & Pac. Ry.* v. *Bloom* (1897) 164 U. S. 636, 17 Sup. Ct. 216; *Tex. & Pac. Ry.* v. *Johnson* (1894) 151 U. S. 81, 14 Sup. Ct. 250; *Bartlett* v. *Cicero, etc. Co.* (1898) 177 Ill. 68, 52 N. E. 339; *Knickerbocker* v. *Benes* (1902) 195 Ill. 434, 63 N. E. 174.

[16] *Tex. & Pac. Ry.* v. *Bloom, supra; Tex. & Pac. Ry.* v. *Johnson, supra.*

[17] The court in the instant case rejected *Re Independent Machine & Tool Co.* (C. C. A. 1918) 251 Fed. 484 as authority for this very reason—"because the alleged bankrupt [the respondent] had there consented to the appointment of the receiver, which could not be treated thereafter as a wrong."

[18] *Cf. supra,* footnotes 5 and 6.

wrongfully deprived of his property and the policy is to place him *in statu quo* as nearly as possible, he should have returned to him not only the property seized but also the naturally accruing profits and improvements which, it is to be assumed in the ordinary case, would have been earned had the respondent himself, and not the receiver been in charge.[19] If the policy is to secure the receiver above all, why limit his recovery against the respondent to the amount of the profits during the receivership? Either policy is defendable but a position midway between seems without purpose.

SUBROGATION OF ONE PAYING OFF A MORTGAGE TO THE RIGHTS OF THE MORTGAGEE.—In a recent New York case[1] an owner of land executed a first and second mortgage to different parties. Upon foreclosure by the first mortgagee, to which the second mortgagee was made a party defendant, the land was sold for an amount insufficient to discharge the second mortgage debt. The purchaser assigned his bid to the mortgagor who gave a new mortgage to a third party to obtain funds to meet the bid, and the mortgagor received a deed from the referee. Upon foreclosure of the new mortgage, the question arose whether the second mortgage was of legal consequence and if so whether the lien was prior to that of the third party. The court *held* that foreclosure extinguished the second mortgage which, however, was revived by the mortgagor's purchase. The lien, therefore, attached at the same time as that of the new mortgage and since the third party enabled the mortgagor to do the act which caused the revival, he was entitled to priority.

A more accurate analysis shows that the second mortgage was not revived but rather kept alive. Though it would have been extinguished by sale of the land to anyone but the mortgagor, equity will not permit him to hold the property free of a lien he is equitably obligated to pay; the second mortgage thus remained in force and was prior in time to the new mortgage. The effect of the judgment and sale, therefore, was only a redemption of the first mortgage,[2] and the true basis of the third party's claim should be subrogation to the rights of the first mortgagee and consequent priority over those of the second mortgagee.

The doctrine of subrogation, *i. e.*, substitution of one person in place of another as holder of a claim, is one which is purely equitable. "It is a creature of equity courts, invented and applied by them to do justice or prevent an injustice being done in a particular case and under a particular state of facts."[3] Courts, however, are not always mindful of that fact, for we read that, "Subro-

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[19] The court admitted that since "the respondents not only did not consent, but actively opposed" the erroneous receivership, "they could not be required to pay expenses." Therefore the fund plus its profits should be returned undiminished to the respondent. But, proceeds the court, there "is obviously not a profit till his [the receiver's] debts and his own allowances are paid." The last statement is merely a restatement by the court in other language of its conclusion that the receiver has a lien to the amount of the profits realized, since there "is obviously not a profit till his debts, *etc.* are paid" only if the respondent is under a duty to pay them. And that is the question to be decided.

[1] *Duer* v. *Kent Realty Co.* (N. Y. Sup. Ct. 1920) 64 N. Y. L. J. 691.

[2] *Otter* v. *Vaux* (1856) 2 Kay & J. 650.

[3] See *Arlington Bank* v. *Paulsen* (1899) 57 Neb. 717, 747, 78 N. W. 303. It is not to be supposed, however, that courts of law entirely close their eyes to the doctrine of subrogation. "In modern times courts of law have dealt with subrogation as they would with assignments, and when the right of action to which the plaintiff asks to be subrogated is a legal right of action, a court of law may treat a plaintiff who is entitled in equity to subrogation as an assignee and allow him to maintain an action of a legal nature on the claim to which he claims to be subrogated." *Dunlop* v. *James* (1903) 174 N. Y. 411, 415, 67 N. E. 60.